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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 363

DOVIE RAY BAKER *et al.*, *Petitioners*

v.

TEXAS AND PACIFIC RAILWAY CO., *Respondent*

PETITIONERS REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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I. Petitioners Desire to Clarify Any Incorrect Impression of the Record that Might be Construed from Brief for Respondent in Opposition.

Respondent does not undertake to deny or answer Petitioners' argument that they were deprived of their right to a jury trial on the issues raised under FELA. Instead Respondent undertakes to avoid the consequences of such denial of a jury trial by laying undue emphasis on the state workmen's compensation aspect of the case. This aspect of the case is irrelevant to the FELA issues involved except possibly as part of the facts that would have been

considered by the jury if it had been permitted to pass on the question of whether Nichols was or was not an independent contractor. And it is completely irrelevant to the ultimate question of Respondent's liability to Petitioners for negligently causing Baker's death.

But although actually irrelevant to any issue or questions now before this Court, that fact that Petitioners received a compensation award has been injected by Respondent in such a manner that Petitioners are compelled to point out its proper setting in the record. One could get the impression from Respondent's brief that Petitioners seek double compensation. Or that Petitioners' receiving a compensation award for Baker's death before learning of the relationship between Nichols and Respondent, is doing something improper in seeking to hold Respondent liable for negligently causing Baker's death.

In the "Statement" of Respondent's brief, page 4, it is stated "Petitioners have never acknowledged that they improperly claimed benefits under the Workmen's Compensation Laws of the State of Texas, * * *." There is no fact in the record to support the statement that Petitioners "improperly" claimed such benefits. The phrasing of this statement is akin to the old familiar loaded question "Have you stopped beating your wife?"

Respondent continues with the statement on page 5:

> "Petitioners do not even acknowledge that the workmen's compensation carrier, Employers Liability Mutual Insurance Company of Wisconsin, will be entitled to recoup its payment in the event Petitioners

> should be successful in this effort to recover from Respondent. (S. F. 207.)"

and then with the statement on page 11:

> "Petitioners' counsel does not even concede that the compensation carrier is entitled to recoup its compensation payment (S. F. 207) in spite of the right of subrogation afforded compensation carriers against negligent third parties by the workmen's compensation laws of the State of Texas."

These statements do not accurately reflect the record. Without cluttering this reply with details, it is necessary only to point out that:

(1) Petitioners state in their pleading that if Baker was not within the provisions of FELA, that Nichols' compensation carrier, Employers Mutual Liability Insurance Co. of Wisconsin (hereinafter called "Insurance Co.") is subrogated to the rights of Petitioners out of any amount recovered by Petitioners from Texas and Pacific Railway Co. (Tr. 14-15.)

(2) During the trial on October 3, 1956 it was stipulated by counsel for both parties that if the Insurance Co. has the right of subrogation against Respondent, T & P Ry. Co., the amount to which it was entitled is seven thousand nine hundred and nineteen dollars and ninety-four cents.

(3) At the same time counsel for both parties agreed that they did not stipulate that said Insurance Co. is entitled to subrogation in the event it be found that Baker was covered by the provisions of FELA (S. F. 207-208).

(4) On October 4, 1956, Insurance Co. filed a plea in intervention claiming a right of subrogation to the rights

of Petitioners to the extent of payment made to Petitioners under the Workmen's Compensation Act and entitled to have judgment out of any recovery from T & P Ry. Co. Insurance Co. plead in the alternative that if Baker is found to be an employee of T & P Ry. Co. that the compensation award to Petitioners was made by mutual mistake and that it was entitled to recover the award out of any recovery by Petitioners from T & P Ry. Co. (Tr., pp. 30-34.)

(5) And on the same day, the Respondent, T & P Ry. Co., amended its answer to state that if it should be determined that Baker was an employee of Respondent then the Insurance Co. is not entitled to be subrogated by reason of payment of Workmen's Compensation to Petitioners because by making such payment it was a pure volunteer. (Tr., p. 25.)

No denial or answer to Insurance Co.'s plea of intervention was ever made by Petitioners.

II. The Compensation Award to Petitioners Was a Fact for the Jury to Consider had It Been Permitted to Pass on Whether Nichols Was or Was Not an Independent Contractor.

It is arguable that the fact that Nichols carried Workmen's Compensation insurance and other insurance, to meet the indemnity obligations imposed upon him by the contract with Respondent, is a fact indicating that Nichols was really an independent contractor. But the more plausible argument is that it is a fact from which the jury could

have found he was not. This latter argument is supported by direct authority.

In *Erie R.R. Co. v. Marque*, 23 F. 2d 664 (C. C. A. 6th 1928), the so-called independent contractor was also required by the contract with the railroad to comply with the Workmen's Compensation Laws of the state. The court said at p. 665 that it had no trouble in believing the intent of this provision was to evade the force and effect of FELA for the purpose of substituting the state Workmen's Compensation Act for FELA because the smaller compensation given under the state act would make it more economical from the employer's standpoint to operate.

In *Cimorelli v. New York Cent. Ry. Co.*, 148 F. 2d 575 (C. C. A. 6th 1945), relied upon by Respondents on page 8 of their brief, Duffy, the alleged independent contractor was required to carry full insurance coverage including Workmen's Compensation. And like the case at bar, there was a special provision in the contract that Duffy was to perform the work as an independent contractor with exclusive supervision of the work. The parties by stipulation submitted to the trial court the issues to be decided as a matter of law. The trial court held Duffy was an independent contractor and that plaintiff was not an employee of the railroad. This holding was reversed on the appeal.

Even where the railroad itself is a subscriber to a state workmen's compensation insurance for its employees engaged in intrastate commerce, most of the cases have held or recognized that the payment and acceptance of compensation under the state workmen's compensation act

did not preclude the maintenance of an action under FELA by one engaged in interstate commerce within the meaning of that act. The basis of these cases is that award, settlement or acceptance of benefits under workmen's compensation cannot be treated as res judicata of the issue of the employee's engaging in intrastate or interstate commerce. *Hoffman v. New York, N. H. & H. R. Co.*, 74 F. 2d 227 (C. C. A. 2d 1934), cert. den. 294 U. S. 715 (1935); *Pritt v. West Va. Northern R. Co.*, 51 S. E. 2d 105 (S. C. W. Va. 1948), cert. den. 336 U. S. 961 (1949). And see annotation at 6 ALR 2d 581 (1948) which is directly in point.

There is no basis in the record to argue that the compensation award to Petitioners was res judicata of the issue of whether Nichols was or was not an independent contractor. Nor any basis that it created any election, waiver or estoppel with regard to such issue. At the most, it was merely a fact for the jury's consideration—if it had been permitted to pass on said issue.

Respectfully submitted,

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